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No. 133

# In the Supreme Court of the United States

OCTOBER TERM, 1962

DANIEL ALTON WILLIAMS, PETITIONER

*v.*

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS

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## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (R. 100–101) is reported at 296 F. 2d 416.

### JURISDICTION

The judgment of the court of appeals was entered on November 9, 1961 (R. 102). By order of February 6, 1962, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to and including March 12 (R. 103). The petition was filed on March 7, and was granted on May 21, 1962 (R. 104). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

In accordance with applicable procedures, the Air Force removed petitioner from his position as a civilian employee. Petitioner, a veteran, thereafter exercised his right to appeal this action to the Civil Service Commission.

The question presented is whether the Veterans' Preference Act and the regulations thereunder made it petitioner's obligation, in the proceedings before the Commission, to arrange for the appearance of all witnesses (including adverse witnesses) whom he wished to examine or cross-examine.

## STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans' Preference Act, 58 Stat. 390, 391, as amended, 5 U.S.C. 863, 868; the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652(a); and the Regulations of the Civil Service Commission, 5 C.F.R. Part 22, are contained in the Appendix, *infra*, pp. 43–49.

## STATEMENT

Petitioner was employed by the United States Air Force on October 13, 1958, as a civilian Recreation Supervisor (Social Activities and Services) at the Air Force Academy's Service Club, which is located on the Academy grounds, north of Colorado Springs, Colorado (R. 35, 4, 94). His duties in that position brought him into frequent contact with cadets and personnel employed at the Academy (R. 48, 25). This case arises out of the removal of petitioner from his position because of three separate homosexual assaults

on three different persons prior to and during the period of his employment.

A. The removal and administrative appeal procedures provided by statute and regulation.—The basic statute governing the removal of federal employees from their positions in the classified civil service is Section 6(a) of the Lloyd-LaFollette Act, 5 U.S.C. 652(a), *infra*, p. 45. That section provides that "No person in the classified civil service * * * shall be removed * * * except for such cause as will promote the efficiency of such service and for reasons given in writing." It says that the employee shall be given notice of the proposed removal and of any charges, provided with a copy of such charges, allowed a reasonable time for filing a written answer with affidavits, and furnished a written decision on his answer. The Act specifies, however, that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer" removing the employee.

The regulations of the Civil Service Commission implementing the Lloyd-LaFollette Act set forth in detail the procedures to be followed in effecting a removal. They provide that an employee may request the Commission to investigate his case in order to determine whether there were procedural irregularities in his removal or whether the removal was made because of political reasons or discrimination resulting from marital status or physical handicap. 5

C.F.R. 9.106 (b) and (c).[1] If the employee alleges discrimination because of race, color, religion, or national origin, he has a right to an appeal to the President's Committee on Government Employment Policy and on such an appeal the burden of coming forward with sufficient evidence rests upon the agency, not the employee. 5 C.F.R. 401.8 and 401.9. Except in cases under the Veterans' Preference Act, the Commission does not review or investigate the sufficiency of the reasons for the removal—that is, the merits of the decision. 5 C.F.R. 9.106(a). At the time of petitioner's removal, neither the Lloyd-LaFollette Act nor the regulations under it required any kind of a hearing for the employee either prior to his removal or during the Civil Service Commission proceedings.[2]

The Veterans' Preference Act (5 U.S.C. 851, *et seq.*) establishes additional procedural protection for "permanent or indefinite" civil service employees who have

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[1] Until recently, the Commission had discretion whether to make an investigation. However, on January 11, 1961, the Commission adopted new regulations granting an employee the right to appeal to the Commission on the grounds which previously gave the Commission discretion to order an investigation. 26 Fed. Reg. 181, *et seq.;* 5 C.F.R. 9.301–9.307 (Cum. Pocket Supp., 1962). On January 19, 1962, the President by Executive Order No. 10988, directed that non-veterans be given procedural rights equal to veterans (27 Fed. Reg. 551–556), and on May 19, 1962, the Commission promulgated regulations effecting that result (27 Fed. Reg. 4759–4762).

[2] The Air Force, like many federal agencies, has adopted a grievance procedure which grants the employee a hearing at his request, and which encourages all witnesses who are Air Force employees to appear. Air Force Manual 40–1, Grievance Proceedings, ¶ 9. A request from the employee for the appearance of a witness may be honored by the grievance committee, but that committee has no authority to compel anyone to testify. *Id.*, ¶ 10 g, h.

served in the armed forces in time of war or in a foreign campaign, and have been separated from the service under honorable conditions. Before such an employee may be removed, the Veterans' Preference Act provides that he shall have thirty days' written notice of the proposed action, setting forth the reasons "specifically and in detail" and that he shall have "a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer." 5 U.S.C. 863, *infra*, p. 43. The Act also gives the covered employee "the right to appeal to the Civil Service Commission" from any removal or other adverse decision and "the right to make a personal appearance" in accordance with reasonable rules and regulations issued by the Commission. *Ibid.* The Act further provides for "investigation" by the Commission and "consideration of the evidence submitted," and makes the Commission's decision binding upon the agency. *Ibid.* The Administrative Procedure Act does not apply to these proceedings since it specifically excepts cases involving removal of federal employees. 5 U.S.C. 1004, 1006.

The Civil Service Commission has issued regulations implementing these provisions of the Veterans' Preference Act. 5 C.F.R. Part 22, *infra*, pp. 45–49. On the employee's appeal from any adverse agency action, the regulations require investigation by the Commission "to develop the facts and circumstances relative to the adverse decision" (5 C.F.R. 22.401(a)), and provide that statements thereby obtained "shall be by affidavit, when practicable" (5 C.F.R. 22.401(b)). Information developed by the Commission's investigation is made

available both to the employee and the agency. 5 C. F.R. 22.401. Pursuant to his statutory right to make a personal appearance on the appeal to the Commission, the regulations give the employee a right to a "hearing" (5 C.F.R. 22.402, 22.601–22.607), which is "informal" (5 C.F.R. 22.602). At this proceeding, the rules of evidence are not strictly applied (5 C.F.R. 22.604), and opportunity is to be afforded to the appealing employee and the agency to introduce evidence and "for the cross examination of witnesses" (5 C.F.R. 22.603). The employee has the burden of prosecuting the appeal, and his failure to do so may result in its dismissal. 5 C.F.R. 22.305. Since the Commission is not authorized to subpoena witnesses, the regulations specify that the employee and the agency "must make their own arrangements for the appearance of witnesses." 5 C.F.R. 22.607. The regulations also provide for an appeal from the initial decision by the Commission's hearing examiner to the Board of Appeals and Review, whose decision becomes that of the Commission. 5 C.F.R. 22.501–22.504.

B. The proceedings arising from petitioner's removal.—On March 6, 1959, petitioner was given thirty days' notice of proposed action to remove him from his position with the Air Force Academy because of an "[a]ttempted homosexual act with an airman of the Air Police Squadron" on February 11, 1959, at Colorado Springs. This allegation was supported by a sworn statement of Airman Patrick Ryan (the man allegedly assaulted) taken from the files of the Provost Marshal's office (R. 11–12, 71–75). Petitioner denied

the charge and asked for a "bill of particulars" so that he could answer the allegations (R. 13).

A new thirty-day notice of proposed removal was issued to petitioner on March 11, 1959, rescinding the earlier notice. The new notice stated as reasons for the proposed removal attempted homosexual assaults: (1) upon Airman Robert Carwithen on November 30, 1957, in Room 403, Colorado Hotel, Denver; (2) upon Sergeant Alton Tyler, on May 10, 1958, on a roadside between Blackhawk, Colorado, and Lowry Air Force Base; and (3) upon Airman Patrick Ryan on February 11, 1959, at 607 North Spruce Street, Colorado Springs (R. 16). In addition, petitioner was charged with willfully damaging a government typewriter at the Service Club on March 4, 1959 (R. 16–17). This notice was based on the original affidavit of Airman Ryan, and additional affidavits by Airman Ryan, Sergeant Tyler, Airman Carwithen, and two other members of the Air Force (R. 75–81, 92–93, 96–99). The letter notified petitioner of his proposed suspension from active duty, and advised him of his rights to reply to the charges personally and in writing, and to produce affidavits or other evidence in support of his reply (R. 17).

Petitioner did not avail himself of his right to answer the charges, in person, before the removing officer. Instead, he denied the charges in a letter dated March 11, 1959, which set forth at length his version of what had happened on each of the occasions in question (R. 20–28). He submitted no affidavits or other evidence in support of his position, and made no request to confront or cross-examine his

accusers. In his letter of March 11, he conceded in effect that he was alone with each of the men on the occasion named, but contended that: (1) Carwithen lied because he wanted revenge for petitioner's having given information to the Air Force's Office of Special Investigations about improper activities of Carwithen's girl friend; (2) Tyler lied because he "probably wanted sexual activity and none occurred"; and (3) Ryan lied to improve his record as a military policeman (R. 26–27).

After considering petitioner's letter and the absence of supporting affidavits or other evidence, the Civilian Personnel Officer of the Academy determined that petitioner had "failed to give sufficient reasons and evidence" in support of his answer, and accordingly removed petitioner from his position (R. 31–33). The personnel officer advised him of his rights to appeal the decision either within the Air Force under the Air Force grievance procedure, or to the Civil Service Commission under Section 14 of the Veterans' Preference Act and the applicable regulations (R. 32). Petitioner was also advised of his right to submit to the Commission a sworn statement supporting in detail his view of the facts, if he wished to be eligible for further employment with the federal government (R. 32; see 5 U.S.C. 863 and 864, *infra*, pp. 44–45).

Petitioner obtained counsel and took a timely appeal to the Civil Service Commission[4] (R. 35). An

[4] He apparently did not take advantage of his opportunity to present a statement in order to retain his eligibility for other employment with the federal government.

investigation was conducted by a representative of the Commission over a period of approximately fifteen days (R. 37). In addition to a sworn statement from petitioner incorporating by reference his letter of March 11 (R. 37), and the sworn statements before the personnel officer at the time of his decision to remove petitioner, the Commission investigator obtained sworn statements from Airman Ryan (R. 91–92), Airman Harris (R. 86–90), and a personnel officer (R. 95).

Petitioner then availed himself of his right to appear personally with counsel before an appeals examiner of the Commission at the Tenth Regional Office in Denver (R. 37, 42). Although petitioner was appealing from the decision of the Air Force Academy to remove him, and was present and sworn, he chose not to testify on his own behalf (R. 42–49). Petitioner's counsel opened his case by moving to strike the charges of the homosexual assaults on Carwithen and Tyler on the ground that they had nothing to do with petitioner's conduct after becoming a civilian employee (R. 43). When this motion was denied, counsel introduced an affidavit designed to impeach Carwithen's affidavit by contradicting one statement in it (R. 44).

Counsel asked the Air Force's representative (a personnel officer named Mrs. Dillon) why Airman Tyler, Ryan, and Stevens[4] had not been brought to

[4] Airman Stevens was apparently a friend of petitioner who was present at petitioner's residence with petitioner, Airman Harris, and Airman Ryan prior to the assault of February 11, 1959 (R. 23–24, 73, 88–89).

the hearing. She replied that two of the three men were stationed at Colorado Springs but that the Air Force Academy saw no need for their attendance (R. 44). Petitioner's counsel then asked if that meant that his request "for the appearance of Airmen Ryan, Stevens and Tyler was rejected," to which Mrs. Dillon replied in the affirmative (R. 44). Counsel made no inquiry about Airman Carwithen or request for his attendance, although Carwithen's sworn statement constituted the basis for the charge of petitioner's homosexual assault on him of November 30, 1957 (R. 44, 96–97). Petitioner had not requested Ryan, Tyler, and Stevens to attend the hearing, and apparently made no other effort to secure their attendance (R. 101). The refusal of the Air Force Academy to require the attendance of the airmen was not designed to, and did not in fact, preclude petitioner from obtaining their attendance (R. 8). Petitioner's counsel made no motion or request to the appeals examiner that he order the Air Force to produce the witnesses or that he strike the affidavits of the airmen, unless the Air Force produced them for confrontation and cross-examination (R. 42–49).

After receiving Mrs. Dillon's answer concerning the attendance of witnesses, petitioner's counsel asked Captain Fox, the Provost Marshal of the Academy, whether Airman Ryan had furnished a statement to him on March 11 (R. 45; see R. 92–93). Captain Fox answered affirmatively, and also stated that Ryan had made a sworn statement on February 11, immediately after the assault on that day (R. 71–75). Arrangements were made to furnish that statement

to counsel (R. 45). Counsel then directed questions to Mrs. Dillon as to her part in the removal of petitioner (R. 45). She stated that the decision to remove petitioner was based upon the affidavits of Carwithen and other airmen as to the facts of the three assaults (R. 45–47). Counsel for petitioner had nothing further to offer except an affidavit as to petitioner's general reputation (R. 45).

Since petitioner had chosen not to testify on his own behalf, the evidence in support of his appeal consisted primarily of his reply of March 11 to the notice of charges (R. 37, 20–28). The only supporting materials he introduced were the affidavit attacking a statement of Carwithen and the affidavit as to petitioner's general reputation. The other evidence before the hearing examiner, much of which had been obtained by the Commission's investigator, consisted of sworn statements of Airmen Carwithen, Ryan, and Tyler, which described in detail the circumstances and events of the homosexual assaults upon them (R. 96–97, 71–75, 91–93, 78–79). In addition, there were several sworn statements corroborating their assertions. Statements of Airmen Davis and Purcell set forth the details of homosexual "passes" or assaults made by petitioner on June 20, 1957, and January 1, 1959, respectively (R. 80–84); a statement by Airman Harris described admissions by Williams and an oral statement by Sergeant Tyler made contemporaneously with the alleged assault on him (R. 87–90); and a statement by Airman Templeton said that he had seen petitioner damaging a government typewriter (R. 75–77).

On this record the appeals examiner found that the charges against petitioner were supported by a preponderance of the evidence and resolved the conflicts in the evidence in favor of the Air Force Academy (R. 38–39). The appeals examiner ruled that the immoral acts engaged in by petitioner before his employment would, if known, have disqualified him for employment, and therefore warranted his removal (R. 39–40). Accordingly, he denied petitioner's motion to disregard the earlier immoral acts, and affirmed petitioner's removal on the basis of those acts as well as the assault of February 11, 1959, and the defacing of the typewriter (R. 39–41).

Petitioner appealed to the Board of Appeals and Review of the Civil Service Commission on the ground that he was innocent of the charges and that he had no opportunity, as allegedly required by the Sixth Amendment, to confront and cross-examine his accusers (R. 50–55). He made no contention that the Veterans' Preference Act or the Civil Service Commission's regulations conferred upon him the right to have the adverse witnesses produced by the Academy. The Board ruled that the charges of homosexual assaults were sustained by a preponderance of the evidence, and that the Sixth Amendment had no application to civil administrative proceedings (R. 56–59). It found, however, that the charge of willfully damaging the typewriter was not sustained by the evidence (R. 58). Accordingly, the Board sustained petitioner's removal entirely on the basis of the three homosexual assaults (R. 58–59).

Petitioner filed this action for a declaratory judgment that his removal was illegal and void, and for reinstatement, alleging that the amount in controversy exceeded $10,000[5] (R. 3–10). Petitioner alleged that the Commission's actions in crediting the evidence of the three airmen, and in permitting the Air Force to refuse to call them as witnesses, was arbitrary and capricious, and in violation of the Fifth and Sixth Amendments. He further alleged that his removal violated the Veterans' Preference Act and the applicable regulations (R. 9–10). The parties filed cross motions for summary judgment on the administrative record (R. 1, 60, 63). The district court denied petitioner's motion and granted respondents' motion without opinion (R. 68).

On appeal, petitioner contended only that the Civil Service Commission had denied him the procedural rights conferred upon him by its regulations and the Veterans' Preference Act. The violation, he argued, resulted from the Commission's failure to require the Air Force to produce Ryan, Tyler, and Stevens. Petitioner did not assert any violation of constitutional rights, nor any other procedural defect. The Court of Appeals for the District of Columbia Circuit affirmed *per curiam*. It ruled that the applicable regulation (5 C.F.R. 22.607) leaves the burden of producing witnesses at a Civil Service Commission

[5] Although the district court does not have authority to award back pay to an improperly discharged employee (28 U.S.C. 1346(d)), its holding that a discharge was illegal would entitle the employee to back pay.

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appeal hearing "upon the party who wants them," and cited its prior decisions upholding this procedure under the regulations and the Veterans' Preference Act (R. 101).

## ARGUMENT

### ON AN APPEAL TO THE CIVIL SERVICE COMMISSION CONTESTING THE REMOVAL OF AN EMPLOYEE FROM GOVERNMENT EMPLOYMENT, THE VETERANS' PREFERENCE ACT AND THE APPLICABLE REGULATIONS PLACE THE OBLIGATION OF ARRANGING FOR THE APPEARANCE OF ANY WITNESSES UPON THE PARTY WHO DESIRES THEM TO TESTIFY

#### INTRODUCTION AND SUMMARY

Petitioner attempts (Pet. Br. 5) to characterize the proceedings on his appeal to the Civil Service Commission from his removal as a denial of an opportunity to confront and cross-examine witnesses. This, however, is not the precise issue which is before this Court. On appeal before the Civil Service Commission, petitioner knew the identity of the witnesses on whose statements the Air Force Academy (the removing agency) relied; indeed, the affidavits on which the proceeding was based had been given to him. The appeals examiner did not deny petitioner the opportunity to produce and examine them or any other witnesses. Thus, there is not the slightest indication that the Commission denied any right of petitioner to confront and cross-examine the witnesses against him.

The sole issue presented by the proceedings before the Commission, as well as the petition for certiorari, is whether, under the Veterans' Preference Act and the Commission's regulations, the removing agency or the employee had the obligation of arranging for

the appearance of any witnesses whom the employee wished to examine.[6] There is no showing, or even allegation, that the Air Force Academy acted in any way to prevent petitioner from obtaining the appearance before the examiner of the three witnesses he claims were vital for confrontation and cross-examination. On the contrary, the evidence shows that there was no design or intent on the part of any official of the Air Force Academy to preclude petitioner from an opportunity to confront and cross-examine those who gave statements against him (R. 85). Petitioner concededly did not request the witnesses to attend the hearing, and failed to explore or pursue available means for arranging for their appearance (R. 101). So far as this record shows, therefore, petitioner might have obtained the appearance of the witnesses if he had undertaken to do so. In short, the question is whether the Act and the regulations under it required petitioner or the Air Force to take the initial step of asking the three witnesses to appear.

We think it important to note several other issues which are *not* before the Court. In the first place, no constitutional issue is raised or presented. Petitioner asserted rights under the Fifth Amendment both be-

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[6] Even as to this issue, it is arguable that petitioner did not properly preserve the rights claimed here by asserting them during the administrative proceedings. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33. Instead of asserting rights based upon the Veterans' Preference Act and the regulations, as he does here, petitioner asserted rights solely under the Sixth Amendment to the Constitution (R. 44, 47, 55, 57), thus depriving the Civil Service Commission of the opportunity to construe its regulations and the Act as petitioner now contends they should be construed.

fore the Civil Service Commission and the district court, but abandoned that argument in the court of appeals and in this Court. Here, his claim is based entirely on the Veterans' Preference Act and the regulations.[8a] Moreover, petitioner makes no contention here that his removal was based upon race, color, religion, national origin, or political opinions. While at one point in the administrative proceedings petitioner did charge that his removal resulted from racial discrimination (R. 47), a full investigation revealed that this charge was unfounded (Supplemental Appendix to Appellees' Brief in the Court of Appeals, pp. 17–55). Petitioner expressly waived his right to a hearing on that issue (Supp. App., *supra*, p. 54), and subsequently abandoned it.

Secondly, other than the asserted lack of opportunity for confrontation and cross-examination, there is no attack upon the procedures followed. Petitioner concededly had due notice of the proposed action. He was told specifically and in detail what he was ac-

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[8a] Thus, petitioner implicitly accepts the principle that a federal employee has no constitutional right to any particular procedure in his removal from his employment, and that, except for rights conferred by statute, he may be dismissed summarily and without the giving of a reason. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896–898. Accord, *In the Matter of Hennen*, 13 Pet. 230, 246, 259; *United States* v. *Perkins*, 116 U.S. 483; *Crenshaw* v. *United States*, 134 U.S. 99, 108; *Parsons* v. *United States*, 167 U.S. 324, 331–334; *Keim* v. *United States*, 177 U.S. 290, 293–294; *Taylor and Marshall* v. *Beckham* (No. 1), 178 U.S. 548, 575–578; *Eberlein* v. *United States*, 257 U.S. 82. At the least, there is no constitutional right involved in requiring the employee to arrange for the appearance of witnesses he desires to have testify rather than the government agency.

cused of, and was given the names and statements of those who gave evidence against him. He concededly had ample opportunity to be heard by the responsible administrative officer of the Air Force Academy and by the appeals examiner and Board of Appeals and Review of the Civil Service Commission. And these hearings included two separate opportunities to rebut the statements made against him by introducing contradictory evidence or testifying on his own behalf.

Finally, we note that petitioner asserts no rights under the Lloyd-LaFollette Act, the basic civil service statute. Indeed, petitioner expressly concedes (Pet. Br. 7, 9) that that Act, which sets forth the procedural rights of the great majority of civil service employees, does not require the government to produce for confrontation and cross-examination persons who may supply evidence adverse to the employee. This concession is compelled by the express language of Section 6(a), *infra,* p. 45, of the Act, which states that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the [removing] officer." Any right that petitioner might have in regard to the production of witnesses, therefore, was granted as a special preference to eligible veterans by the Veterans' Preference Act or the regulation issued under it.

In this brief, we will show that the Act and regulations place the obligation of arranging for the appearance of all witnesses before the Commission upon the party desiring them to testify. Indeed, the applicable regulations specifically impose this burden. 5 C.F.R. 22.607. We will then show that these regu-

lations are fully in accord with the Veterans' Preference Act, its legislative history, the uniform judicial decisions, and consistent administrative practice.

A. THE APPLICABLE REGULATIONS PROVIDE FOR THE PROCEDURES FOLLOWED BY THE COMMISSION IN THIS CASE

The regulations of the Civil Service Commission applicable to administrative appeals under the Veterans' Preference Act make clear that the agency may sustain its removal of the employee through written statements and that, if the employee wishes to produce any witnesses, the burden is on him to do so. They provide in 5 C.F.R. 22.401(b), *infra*, p. 46, that "[s]tatements of the witnesses shall be by affidavits, when practicable * * *." A further provision, 5 C.F.R. 22.603, *infra*, p. 48, states that both the removing agency and the employee shall have "[o]pportunity * * * for the introduction of evidence (including testimony and statements * * * by representatives of the agency and its witnesses) * * *." Consequently, the Civil Service Commission clearly has authority under the regulations to consider written statements as well as the testimony of witnesses. Furthermore, under a section entitled "Appearance of witnesses," the regulations state that "the employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses." 5 C.F.R. 22.607, *infra*, p. 49. Thus, the employee is explicitly required to arrange for the appearance of any witness he desires to have appear. No distinction is made by the regulations as to the kind of witness involved—whether they are likely to be hostile or

friendly, whether the removing agency has relied on their written statements or not, the employee must arrange for their appearance. While 5 C.F.R. 22.603 also provides "for the cross-examination of witnesses," petitioner was not denied this right. If he had arranged for the appearance of the witness, as 5 C.F.R. 22.607 provide, he was entitled under 5 C.F.R. 22.603 to cross-examine them.

Thus, petitioner's contention that the employing agency must arrange for and produce witnesses whose presence is desired by the employee is contrary to the explicit language of the regulations. We submit that the regulations mean what they say—particularly since, as we will now show, this interpretation is consistent with the regulatory scheme governing employee appeals to the Civil Service Commission, and has been consistently followed by the Commission and by every court which has had the opportunity to consider it.

1. The regulations issued pursuant to the Veterans' Preference Act provide broadly for an investigation of the facts by the Commission—the agency with responsibility to decide the appeal. 5 C.F.R. 22.401, *infra,* pp. 46–47. The information found, like other evidence in the form of written statements, is considered by the Commission as evidence. 5 C.F.R. 22.603, *infra,* p. 48. Furthermore, the regulations state specifically that the "[r]ules of evidence will not be strictly applied" (5 C.F.R. 22.604, *infra,* p. 48) and that "[t]he hearing will be informal" (5 C.F.R. 22.602, *infra,* p. 48). It is perfectly consistent with such informal procedures for the Commission to re-

quire each party to arrange for any witnesses it desires.

The informality which characterizes the appellate hearings before the Commission also ensures that the obligation of the appealing employee to produce any witnesses on whom he relies does not work any unfairness or hardship. For if the employee desires to confront and cross-examine an adverse witness, he does not restrict the scope of his interrogation or forfeit the right to ask leading questions merely by making arrangements for the witness' appearance at the hearing. As the record of the hearing in this case reveals (R. 42–49), the employee's counsel is free at the informal hearings to interrogate all persons present on all matters having any bearing on the proceeding (with leading questions if he desires) whether or not those persons have testified for the other party.

Petitioner contends (Pet. Br. 9) that the regulations require the employee and employing agency to make arrangements only for the appearance of "their own witnesses," *i.e.*, witnesses whose testimony is likely to be favorable. He argues that otherwise it renders "meaningless" the provision of 5 C.F.R. 22.603, which affords both the employee and the agency "[o]pportunity * * * for the cross-examination of witnesses." But this distinction between friendly and hostile witnesses is inconsistent with 5 C.F.R. 22.607, which says that each party is responsible for all witnesses it desires to have appear. Moreover, the provision for the cross-examination of witnesses in 5 C.F.R. 22.603 is important under the Commission's interpretation of the regulations, because it allows

both parties the opportunity to cross-examine those persons who are produced by the other side and give testimony in person. Such witnesses are likely to be offered by the parties where there is a substantial conflict of written evidence and therefore live testimony would probably have a significant impact on the examiner.[7] At any rate, under 5 C.F.R. 22.603, the employee has an opportunity to cross-examine those witnesses whom the agency does not produce, if he is willing to undertake the burden of arranging for their appearance. Thus, 5 C.F.R. 22.603 is entirely consistent with 5 C.F.R. 22.607, and is in no sense "meaningless."

2. Consistent administrative practice in interpreting statutes and regulations is, of course, entitled to great respect. This Court has said that administrative practice is given "peculiar weight" where "it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315. Such consistent administrative practice "will not be overturned except for very cogent reasons." *Ibid.* This principle applies *a fortiori* to the interpretation of a regulation by the agency which administers it. Such an administrative regulation is "the ultimate criterion * * * which becomes of controlling weight unless it is plainly erroneous or incon-

[7] Here there was no such conflict since petitioner relied almost entirely on his own affidavit, unsupported by any corroboration, which was contradicted by affidavits of numerous other persons.

sistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413–414; *Chapman* v. *Sheridan-Wyoming Co.* 338 U.S. 621, 631.

Petitioner recognizes the weight which should be accorded to the contemporaneous administrative construction, but purports to find in it support for his position (Pet. Br. 8–9). The facts are these. The Veterans' Preference Act became law on June 27, 1944, and the Civil Service Commission almost immediately promulgated regulations under it. Those regulations—which are the only authority cited by petitioner for his argument concerning administrative practice (Pet. Br. 8)—were substantially identical to the regulations presently in force on the questions involved in this case. Compare §§ 22.8 and 22.9, 9 Fed. Reg. 13189–13191, with 5 C.F.R. 22.401–407 and 22.601–607. In particular, the 1944 regulations contained a provision requiring the appealing employee to make his own arrangements for the appearance of witnesses (§ 22.9(f), 9 Fed. Reg. 13191) in language substantially identical to the present regulation (5 C.F.R. 22.607, *infra*, p. 49). The Commission has never read those regulations to mean, as petitioner contends, that the appealing employee must make arrangement only for the appearance of witnesses friendly to him. On the contrary, the Commission, from the beginning, has interpreted them to allow the removing agency to rest its case on written statements and to impose on the appealing employee the burden of making his own arrangements for the appearance of all witnesses he wishes to be pres-

ent, including witnesses who have supplied evidence adverse to him.[8]

This Court recently gave great weight to an administrative interpretation of agency procedural regulations which had been applied in only nine proceedings. *Power Reactor Development Co.* v. *International Union of Electrical Workers,* 367 U.S. 396, 408–409. The Civil Service Commission's interpretation of its regulations has been applied in literally thousands of proceedings under the Veterans' Preference Act, and, as we show below, has been sustained by every court which has considered the regulations. This interpretation, which conforms to the natural reading of the regulations, is conclusive here.

3. The two courts which have been called upon to construe the regulations governing employee appeals to the Civil Service Commission under the Veterans' Preference Act have invariably sustained the Commission's interpretation of its regulations.[9] They

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[8] Since petitioner never asserted any rights based upon the regulations before the Civil Service Commission (instead he relied entirely on constitutional arguments which he has since abandoned (see *supra*, pp. 9–10, 12)), the decisions of the hearing examiner and Board of Appeals and Review contain no reference to the Commission's practice. We have been advised by letter that the Commission's consistent practice and interpretation of its regulations were followed in this case. See App. B, *infra*, pp. 50–51.

[9] Prior to the enactment of P.L. 87–748, 76 Stat. 744, in October of this year, suits arising out of an assertedly illegal discharge under the Veterans' Preference Act could be brought either in the District Court for the District of Columbia or in the Court of Claims. See *Blackmar* v. *Guerre*, 342 U.S. 512. Under the new legislation, federal officials may be sued and served in the district in which the plaintiff resides.

have held, as we argue, that the regulations place upon the employee the obligation of arranging for the appearance of any witnesses he decides to have testify, including persons on whose written statements the removing agency relies.

In *Deviny* v. *Campbell,* 194 F. 2d 876 (C.A. D.C.), certiorari denied, 344 U.S. 826, the employee requested the presence at the hearing of adverse witnesses who were employees of the agency which removed him. The employee asserted that the Commission's failure to require the attendance of two of these witnesses deprived him of the right to cross-examination. 194 F. 2d at 879. Pointing to a section of the regulations virtually identical with the present 5 C.F.R. 22.607, *infra,* p. 49[10] which requires each party to make arrangements for the appearance of witnesses, the court of appeals said that "it is plain" that the refusal of the Commission to require the presence of the hostile witnesses did not violate its regulations, and that those regulations did not require or contemplate "an adversary proceeding and the compulsory attendance of witnesses for cross-examination." 194 F. 2d at 879. The Court of Appeals for the District of Columbia Circuit followed *Deviny* v. *Campbell* in *Green* v. *Baughman,* 243 F. 2d 610, 613,

[10] The other regulations in effect at that time were also substantially the same as those presently in force with regard to the procedure sto be followed in the appellate hearing before the Commission. Compare §§ 22.8 and 22.9, 9 Fed. Reg. 13189–13191, with 5 C.F.R. 22.401–407 and 22.601–607.

certiorari denied, 355 U.S. 819, and has continued to follow it since that date.[11]

The Court of Claims has also upheld the Commission's interpretation of the regulations. In addition to the reasons set forth the District of Columbia Circuit, the Court of Claims has emphasized the grant of investigatory powers to the Commission and the appellate nature of its proceedings. In keeping with its conclusion that adversary trial-type procedures were not contemplated, it has ruled that the Commission may act upon affidavits and statements of persons who have not been produced for cross-examination. *Atkinson* v. *United States,* 144 C. Cls. 585, 598–601. "Proceedings before the Civil Service Commission and its regional agencies," it has declared, "need not be cast in the mold of court proceedings." *Id.* at 599. Similarly, in a later case the Court of Claims has upheld the Commission's refusal to require the employing agency to produce for confrontation and cross-examination two of its employees who had given evidence against the appealing employee. *Horn* v. *United States,* 177 F. Supp. 438, 439–440.

Petitioner has cited no decisions interpreting the applicable regulations which support his interpretation, and we have found none. In the absence of direct authority, petitioner relies principally upon this Court's decision in *Vitarelli* v. *Seaton,* 359 U.S. 535.

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[11] We have made no effort to collect the numerous unreported decisions sustaining the Commission's procedures on administrative appeals under the Veterans' Preference Act, since petitioner concedes (Pet. Br. 6) that *Deviny* has been consistently followed in the courts in the District of Columbia.

There, this Court held a dismissal from federal employment for security reasons unlawful because, *inter alia,* the applicable regulations contemplated the calling of non-confidential informants to testify in person against the accused, and the statement of one such informant was used although he was not called by the removing agency to testify or be cross-examined. *Id.* at 544–545. The decision in *Vitarelli* is inapplicable here, however, because the proceedings and regulations in that case—those of the Department of the Interior governing discharges for security reasons—were wholly unlike those of the Civil Service Commission.

The sole ground for this Court's holding in *Vitarelli* that the regulations had been violated by the reliance on an informant who was not present to be cross-examined is as follows (359 U.S. at 544, note 6):

> This reading of the provision is supported by § 21(e) of the Order, which provides in part that "if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration," thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board.

The regulations of the Civil Service Commission contain no comparable provision. Instead, as noted above, 5 C.F.R. 22.607 imposes upon the employee the burden of producing witnesses whose presence

he desires. Since the basis for the holding in *Vitarelli* is absent in the Commission's regulations, the rationale of that decision is inapplicable.[12]

4. There are no facts peculiar to this case which warrant any departure from the procedures established by the clear language of the regulations and their consistent administrative and judicial construction. The established procedures governing the ad-

[12] In addition, there are several other important distinctions between the Department of Interior regulations involved in *Vitarelli* and those of the Commission here. First, the hearing provided by the Department of Interior regulations took place prior to any decision to remove the employee, and the decision was to be made by the Secretary of the Interior upon the recommendation of the security hearing board. Section 21(k) of Dept. of Interior Order 2738, Brief for the Respondents in No. 101, Oct. Term, 1958, p. 45. Here, as we will see (pp. 33–34), the action of removal has already been taken by the Air Force and the proceeding before the Commission is on appeal. Thus, in *Vitarelli*, unlike in this case, there was no administrative decision to overturn, with its presumption of correctness.

Second, under the regulations of the Department of the Interior, the hearing board had no authority comparable to that of the Civil Service Commission (5 C.F.R. 22.401) to make an independent investigation to obtain relevant evidence in the form of affidavits or otherwise. The former proceedings, therefore, were much more like a traditional adversary hearing than the proceedings before the Commission.

Third, the regulations in *Vitarelli* required the hearing board to "reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession." Section 21(k), *supra*. This provision indicated that written statements, not being a part of the transcript, could not be considered unless they were from confidential informants. No similar provision is included in the Civil Service Commission's regulations. Instead, 5 C.F.R. 22.603 allows the consideration of written statements by the Commission (see *supra*, pp. 17–18).

ministrative appeal were fair to petitioner. They provided him with ample opportunity to show that the initial administrative determination was in error; they did not foreclose the right to examine and cross-examine witnesses.

The fact that both of the witnesses whom petitioner requested the Academy to produce were in the Air Force does not warrant any departure from the procedures set forth in the regulations.[13] Petitioner does not, and could not on this record, suggest that the Air Force Academy precluded him from arranging for the appearance of those witnesses. No coercion or influence was exerted by the Academy against the airmen to prevent their appearance. Thus, if petitioner had undertaken to make the arrangements for their appearance, the record contains no indication that the witnesses would not have appeared. All that is known is that petitioner, for reasons which have never been disclosed or even suggested, made no effort even to ask the witnesses to attend the hearing. There is no occasion to consider the situation which would have been presented if petitioner had shown that he was unable to arrange for their appearances.[14]

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[13] Several of the decided cases involve refusals by the Commission to require the appearance of employees of the agency which removed the appealing employee. *Deviny* v. *Campbell*, 194 F. 2d 876 (C.A. D.C.), certiorari denied, 344 U.S. 826; *Green* v. *Baughman*, 243 F. 2d 610, 613 (C.A. D.C.), certiorari denied, 355 U.S. 819; *Horn* v. *United States*, 177 F. Supp. 438 (C. Cls.).

[14] The fact that the charges against petitioner were serious does not require any departure from the procedure prescribed by the regulations. And it should be noted that removal from

Moreover, it is significant that petitioner, although present and sworn, chose not to testify in his own behalf in these civil administrative proceedings (R. 42–49). He produced no other witnesses to testify for him (*ibid.*). The only first-hand evidence supporting the petitioner's position was his own affidavit. In these circumstances, it was hardly arbitrary or surprising that the Commission decided to accept the affidavits of three apparently disinterested witnesses, when these witnesses had personal knowledge of the disputed facts, they described three unconnected incidents, and their affidavits were corroborated by the sworn statements of several other persons, instead of the affidavit of one person whose employment was at stake.

B. THE VETERANS' PREFERENCE ACT AUTHORIZED THE COMMISSION TO ISSUE THE APPLICABLE REGULATIONS

We have shown above that the Civil Service Commission regulations governing employee appeals under the Veterans' Preference Act make it the task of the appealing employee to undertake arrangements for the presence of all witnesses whom he desires to examine. Here we show that the Veterans' Preference Act itself does not give the employee a right to have the Commission arrange for the appearance

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federal civilian employment does not have as great an impact upon the employee's future as a less than honorable discharge from the military service. Compare *Harmon* v. *Brucker*, 355 U.S. 579; *Beard* v. *Stahr*, 370 U.S. 41, 43 (dissenting opinion). The reasons for a removal from civilian employment, although disclosed to prospective employers who inquire, are not made available to the general public. See, *e.g.*, Air Force Manual 40–2, Ch. 6, Sec. B.

of witnesses, and that the regulations are authorized by, and consistent with, that Act.

The Veterans' Preference Act confers upon an employee who has been removed "the right to appeal to the Civil Service Commission" and "to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission." 5 U.S.C. 863, *infra*, pp. 43–44. The Act makes no reference to any right to a hearing, to cross-examination of witnesses, or to production of witnesses. Furthermore, the Act authorizes the Commission to issue all reasonable rules in determining an employee's appeal without restricting—except for the right of the employee to make an appearance—the particular procedures to be followed. Regulations promulgated under such an authorizing provision may be overturned only if "unreasonable and plainly inconsistent with" the statutes. *Commissioner of Internal Revenue* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; accord, *e.g.*, *United States* v. *Shimer*, 367 U.S. 374, 381–383; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90. Since the regulations issued by the Commission are clearly reasonable and not inconsistent with any statute, they are well within the authority conferred by Congress.

1. In enacting the Lloyd-LaFollette Act, which is the foundation of the classified federal civil service, Congress adopted the policy that discharges from the service must be for cause, but that the determination of cause is to be made primarily by the respon-

sible administrative officer, with limited procedural rights in the employee. It specifically provided that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." 5 U.S.C. 652(a). This policy remained in effect at the time of the enactment of the Veterans' Preference Act, and has continued down to the present.

Section 14 of the Veterans' Preference Act, to be sure, conferred on veterans certain "special preferences." S. Rep. No. 907, 78th Cong., 2d Sess., p. 3. These rights were carefully and meticulously added to the Lloyd-LaFollette Act through language similar to, but slightly broader than, Section 6 of the latter Act. While the Lloyd-LaFollette Act provides merely for "notice" of the proposed removal, the Veterans' Preference Act provides for "at least thirty days advance written notice." 5 U.S.C. 652(a), 863. Similarly, the Lloyd-LaFollette Act gives the employee "a reasonable time for filing a written answer to such charges, with affidavits," while the Veterans' Preference Act gives the employee "a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer." Thus, the veterans' preference eligible is granted the additional right to answer the charges in person before the appropriate administrative officer.

The right to appeal any adverse decision to the Civil Service Commission was an additional "special preference" granted to those covered by the Veterans'

Preference Act. This was accomplished by adding to the language paralleling the Lloyd-LaFollette Act the provision granting the employee the right to appeal and the following relevant clauses concerning the appellate proceedings (5 U.S.C. 863):

> That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, * * *.

The only specific right granted the employee is the right "to make a personal appearance, or an appearance through a designated representative," and even such appearance must be "in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission." Although the Act grants the right to be heard, it does not in any way imply that the employee has a right to an adversary trial-type hearing, or to confrontation and cross-examination of the witnesses on whose written statements the removing agency relies.

Indeed, the very language used by Congress shows that it did not require or contemplate a trial-type hearing. The Act granted the employee only the right to make an appearance, not the right to a hearing. The Act conferred no subpoena power on the

Commission (see 5 C.F.R. 22.607), which would have been necessary if Congress contemplated a trial-type hearing, with the removing agency required to offer testimony. Equally persuasive is the Congressional direction that the Commission make an "investigation." The assembling of evidence by the tribunal through an independent investigation is not, of course, compatible with a traditional adversary proceeding.

That Congress did not contemplate or require such a proceeding is conclusively confirmed by its action two years after the adoption of the Veterans' Preference Act. In 1946 Congress passed the Administrative Procedure Act which specifically exempted from its requirements concerning a trial-type hearing matters pertaining to the selection or tenure of federal employees. Secs. 5 and 7, 5 U.S.C. 1004, 1006. This exception was made because "control of public personnel has been traditionally regarded as a discretionary function." S. Rep. No. 752, 79th Cong., 1st Sess., p. 16.[15]

Even if the Veterans' Preference Act could be read to require a trial-type hearing, petitioner would still not be entitled to prevail. The Act gives the employee "the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer." 5 U.S.C. 863, *infra,* p. 43; see also 5 C.F.R. 22.301,

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[15] Consistent with the view that the statute does not contemplate a trial-type hearing, the courts have also regularly ruled that, so long as the prescribed procedure is followed, the Commission's decision on the merits is not reviewable. See, *e.g.*, *Keim* v. *United States*, 177 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *Green* v. *Baughman*, 243 F. 2d 610, 613, certiorari denied, 355 U.S. 819, and cases cited.

*infra,* p. 46. This means that the Veterans' Preference Act, like the Lloyd-LaFollette Act, leaves the decision as to the removal of any employee initially and primarily to the responsible administrative officer in the employing agency. 5 U.S.C. 863, 652(a), *infra,* pp. 43–45. Since the proceeding before the Commission is an "appeal" from an administrative decision, the burden of showing the incorrectness of that decision would naturally be placed upon the person taking the appeal.[16]

This principle, which applies equally to trial-type proceedings, is well established in our law. It has been frequently held that once an administrative agency has made a decision and taken action, its action is presumptively correct, and the person adversely affected has the burden of proof, both as to introducing testimony and other evidence, and as to the burden of persuasion, even in adversary *de novo* proceedings. See, *e.g., Cohen* v. *Secretary,* 7

[16] The regulations place the burden of prosecuting the appeal on the employee: "An appeal will be closed for failure to prosecute, when the appellant does not furnish required information and duly proceed with the advancement of his appeal." 5 C.F.R. 22.305, *infra,* p. 46.

The procedure prescribed for appeals under the Veterans' Preference Act is quite different from that provided for the removal of Army officers. See *Beard* v. *Stahr,* 370 U.S. 41, 43, (dissenting opinion). In the Army proceeding, the burden is on the officer at the initial proceeding to show cause why he should be retained. Under the Veterans' Preference Act and the regulations, however, the responsible administrative officer removes the employee only if a preponderance of the evidence warrants such removal. The burden shifts to the employee only after the decision of the administrative officer against him, and is, insofar as this case is concerned, only a burden of producing witnesses.

T.C. 1002; *Golbert* v. *Renegotiation Board,* 254 F. 2d 416, 417 (C.A. 2); *Pittsburgh S.S. Co.* v. *Brown,* 171 F. 2d 175–179 (C.A. 7); *Baltensperger* v. *United States,* 174 F. Supp. 601 (D. Neb.). Similarly, Section 7 of the Administrative Procedure Act provides, as to trial-type proceedings, that "the proponent of a rule or order shall have the burden of proof." 5 U.S.C. 1006(c). Therefore, even were we to assume *arguendo* that the Veterans' Preference Act contemplated a full trial-type proceeding before the Commission, it would have been entirely consistent with this requirement to place the burden of proof on the employee. Here, the government's argument is much more limited. The Commission's regulations do not place the burden of proof on the employee; they merely require him to go forward by arranging for his own witnesses, whether they are the witnesses on whose written statements the removing agency relies or others.

2. The legislative history of the Veterans' Preference Act confirms the Congressional purpose, apparent from the language of the Act itself, to grant an appeal to the Civil Service Commission with only one specific procedural right on that appeal, namely to make "a personal appearance, or an appearance through a designated respresentative." Thus, the Senate report described the rights conferred in regard to the appeal to the Civil Service Commission as follows (S. Rep. No. 907, 78th Cong., 2d Sess., p. 3):

> This section also confers upon preference eligibles the right to appeal to the Civil Service Commission from adverse decisions of admin-

istrative officers, and to make a personal appearance or an appearance through a designated representative in accordance with rules and regulations to be issued by the Civil Service Commission.

The House report contained similar language. H. Rep. No. 1289, 78th Cong., 2d Sess., p. 4. Congressman Starnes, the author of the bill (90 Cong. Rec. 3502), described the appeal provisions in much the same language in explaining it on the floor of the House. 90 Cong. Rec. 3503. Nowhere in the committee reports, or in statements on the floor, did any member of the Congress state or suggest that the bill conferred any procedural rights on the administrative appeal other than those specified. 90 Cong. Rec. 3501–3505.

Full hearings were held before the Senate Civil Service Committee prior to the enactment of the Veterans' Preference Act. Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess. The transcript of that hearing likewise fails to support petitioner's position. Not once during the entire hearing was there any suggestion that the Act was designed to confer on veterans the right to a trial-type hearing, with compulsory confrontation of witnesses and the like.

Petitioner, apparently acknowledging that none of the legislative materials in the 78th Congress which enacted the Veterans' Preference Act are of any help to his position, relies (Pet. Br. 8) on a statement made by a witness for the Veterans of Foreign Wars in hearings before a House Committee of the 75th Congress in 1937, some seven years and three Con-

gresses before the Act's adoption. The witness stated that the bill then before the Committee was intended to provide an employee who has been removed "a proper hearing" and "an opportunity to defend himself by trial." Reliance on such evidence of legislative intent requires little refutation. This Court ruled in *Rainwater* v. *United States,* 356 U.S. 590, 593, that one Congress' construction of a much earlier Congress' intent is ordinarily entitled to little weight. Statements by a witness to a committee of a far earlier Congress deserve even less consideration. At any rate, the quotation relied upon by petitioner does not assist him because the witness used the terms "hearing" and "trial" to mean "opportunity to be heard." See Hearings before the House Committee on Civil Service on H.R. 5558, 5821, and 6497, 75th Cong., 1st Sess., pp. 118, 122. And in stating in effect that the employee would have a right to be heard and to defend himself, the witness was merely restating the employee's right to make a personal appearance. That right was specifically included in Section 14 of the Veterans' Preference Act and was of course afforded to petitioner here. At no point in the 1937 hearings did that witness, or any other witness, state or imply that the proposed bill would require the employing agency to arrange for the appearance of the witnesses whom the employee wished to have testify.

If Congress had proposed to depart from its long-established policy of not providing for trial-type hearings on removals from government service, it certainly would have manifested that intent in the Act itself, or at least in the committee reports and

in statements on the floor. The absence of any suggestion in the legislative materials is a convincing demonstration that Congress did not intend to confer any such right.

Legislative events following the 1944 adoption of the Veterans' Preference Act confirm our view. As we have seen (pp. 32–33), in 1946 Congress adopted the Administrative Procedure Act, specifically excepting personnel cases from that Act's general requirements of a trial-type hearing. In 1947 the Veterans' Preference Act itself was amended to enlarge the authority of the Civil Service Commission by making its decisions on employee appeals binding upon the employing agency.[17] By this date the Civil Service Commission had adopted its regulations clearly stating its practice of requiring the employee to arrange for the appearance of all witnesses desired by him. See § 22.9(f), 9 Fed. Reg. 13189, 13191. Congress implicitly accepted and ratified that interpretation by reenacting precisely the same language as that previously used, *i.e.*, the provision giving the employee only the right to make a personal appearance, or to have a representative, on his appeal to the Commission. Act of Aug. 4, 1947, c. 447, 61 Stat. 723. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 293, and the cases cited therein; *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 409. The committee reports and discussion on the floor again make

[17] Prior to that time, the Commission could only recommend corrective action by the agency. 58 Stat. 390, 391; see also Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess., p. 30.

it clear that no more was intended. S. Rep. No. 631, 80th Cong., 1st Sess., p. 1; 93 Cong. Rec. 7319.

3. The Commission's interpretation of the Veterans' Preference Act is entitled to particularly great weight. The chief proponent of the Act—the man who explained its provisions and meaning to the members of the Senate Committee which reported it—was Arthur S. Flemming, who was then a Civil Service Commissioner. Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess., pp. 10–32. While the contemporaneous interpretation of a statute by those who are charged with administering it is always of substantial importance, we think that such construction should be given even greater deference where the bill is sponsored, supported, and explained by the agency which is to be charged with its administration.

*Norwegian Nitrogen Co.* v. *United States,* 288 U.S 294, to which we have referred earlier, strikingly resembles the case at bar. That case involved proceedings before the Tariff Commission, which Congress had denominated "hearings." Congress had also provided that importers and other interested parties should be given "reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." *Id.* at 303. The Tariff Commission, like the Civil Service Commission, was authorized to make investigations. The subject in controversy, tariff rates, like the matter here, was not in an area of rights traditionally protected by the Constitution, but was one in which the individuals affected had an important and direct financial interest. The importer there involved asserted the right to examine the evidence, to be heard on all evidence collected by the

Tariff Commission in its investigation, and to cross-examine the Commission's experts and informants with reference to the information they collected. *Id.* at 301, 303. And, just as the employee here is demanding the right to cross-examine others without having subjected himself to cross-examination, the importer in *Norwegian Nitrogen* sought to obtain cost information of its competitors without disclosing that information about the foreign company whose goods it imported. *Id.* at 300. This Court, after noting that the term "hearing" may have different meanings in different contexts, relied on the Tariff Commission's interpretation of the statute and ruled that the Act did not grant the importer the rights he claimed. Cf., *United States* v. *Nugent,* 346 U.S. 1.

The argument for upholding the Civil Service Commission's interpretation of the Veterans' Preference Act is in many ways stronger than that for upholding the interpretation of the Tariff Commission which was accepted by this Court in *Norwegian Nitrogen.* In this case there was full disclosure to the employee of all the evidence which the Civil Service Commission had before it, and full opportunity to offer any conflicting testimony or evidence to rebut or contradict it. Moreover, in this case the regulations provided a method for cross-examining those who had given adverse information if the employee merely arranged for their appearance. Thus, petitioner could have confronted and cross-examined the hostile witnesses, if he had arranged for their appearance. Finally, he is in no position to deny that such arrangements could have been made.

4. Both courts which have considered the Veterans' Preference Act have upheld the Civil Service Com-

mission's interpretation of it, as well as the Commission's regulations (see *supra,* pp. 23–26), by rejecting the contentions made by petitioner here. *Deviny* v. *Campbell,* 194 F. 2d 876 (C.A. D.C.), certiorari denied, 344 U.S. 826; *Green* v. *Baughman,* 243 F. 2d 610, 613 (C.A. D.C.), certiorari denied, 355 U.S. 819; *Atkinson* v. *United States,* 144 C. Cls. 585, 598–601; *Horn* v. *United States,* 177 F. Supp. 438, 439–440 (C. Cls.). Thus, in *Deviny* v. *Campbell* the Court of Appeals for the District of Columbia Circuit held that the Veterans' Preference Act did not require or contemplate a trial-type hearing with the compulsory appearance of witnesses, and that the regulations imposing the burden of producing witnesses upon the party desiring their presence were authorized by the Act. 194 F. 2d at 880. In doing so, it relied upon the absence of subpoena power in the Commission, the basic policy set forth by Congress in the Lloyd-LaFollette Act, and the express exception from the hearing requirements of the Administrative Procedure Act.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

ARCHIBALD COX,
*Solicitor General.*
JOSEPH D. GUILFOYLE,
*Acting Assistant Attorney General.*
BRUCE J. TERRIS,
*Assistant to the Solicitor General.*
ALAN S. ROSENTHAL,
DAVID L. ROSE,
*Attorneys.*

NOVEMBER 1962.

See page 38 for footnote 17.

## Appendix A

1. Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 863, provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt

of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendationss to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

2. Section 15 of the Veterans' Preference Act, 58 Stat. 39, as amended, 5 U.S.C. 864, provides:

Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 856 of this title, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 856 and 857 of this title. No appointment shall be made from an examination register of eligibles, ex-

cept of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

3. Section 6(a) of the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652(a) provides:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

4. The Civil Service Commission Regulations, entitled "Appeals of Preference Eligibles under the Vet-

erans' Preference Act of 1944," provide in pertinent part:

§ 22.301. RIGHT OF APPEAL.

An employee may appeal to the Commission from any decision of an administrative officer to take adverse action.

* * * * *

§ 22.305. FAILURE TO PROSECUTE APPEAL.

An appeal will be closed for failure to prosecute, when the appellant does not furnish required information and duly proceed with the advancement of his appeal. In lieu of closing for failure to prosecute, an appeal may be adjudicated if the information is sufficient for that purpose. A closed appeal will not be reopened except in the discretion of the Commission upon a showing that circumstances beyond the control of the appellant prevented him from prosecuting the appeal.

* * * * *

SUBPART D—COMMISSION ACT ON INITIAL APPEAL

§ 22.401. INVESTIGATION.

(a) *Scope.*—Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.

(b) *Evidence.*—Statements of the witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

(c) *Evidence available to both parties.*—All relevant representations shall be discussed with both parties to the appeal and shall be available for review by them, with the following exceptions: Where adverse action has been taken on the basis of the reported mental condition of the individual concerned or other condition of such a nature that a prudent physician would hesitate to inform a person suffering from such a condition as to its exact nature and probable outcome, the medical evidence of record will be made available only to a duly licensed physician

designated in writing by the appellant or by appellant's representative.

§ 22.402. RIGHT TO A HEARING.

The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

* * * * *

§ 22.404. RECOMMENDED CORRECTIVE ACTION.

The Chief, Appeals Examining Office, or the regional director shall recommend such corrective action as may be necessary.

* * * * *

§ 22.406. AGENCY ACTION.

It is mandatory for the agency to take corrective action in accordance with the decision made by the Chief, Appeals Examining Office or the regional director, unless appeal is made to the Board of Appeals and Review.

* * * * *

§ 22.501(a). APPEALS TO THE BOARD OF APPEALS AND REVIEW.

*Appeal from decision of a Commission office.* When an employee or the employing agency elects to appeal from a decision of the Chief, Appeals Examining Office, or regional director, such appeal shall be made to the Board of Appeals and Review (hereinafter referred to as the "Board"), U.S. Civil Service Commission, Washington 25, D.C.

* * * * *

§ 22.503. FINALITY OF DECISION.

The decision on an appeal to the Board shall be final. There is no further right to appeal. A recommendation for corrective action is mandatory and must be complied with by the

agency. Where corrective action is required, the agency shall report to the Board promptly that such action has been taken.

* * * * *

SUBPART F—HEARINGS

§ 22.601. RIGHT TO APPEAR AT HEARING.

An employee has a right to appear at the hearing on his appeal, personally or through or accompanied by his representative, before the office of the Commission handling the appeal. The agency has a right to participate in such a hearing. Both parties shall have the right to produce witnesses.

§ 22.602. HOW CONDUCTED.

The hearing will be informal and will be conducted by a representative of the Commission.

§22.603. INTRODUCTION OF EVIDENCE.

Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§ 22.604. RULES OF EVIDENCE.

Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§ 22.605. TESTIMONY TAKEN UNDER OATH; RECORD OF HEARINGS.

The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each

party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary, the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

§22.606. LIMITATION ON ATTENDANCE AT HEARINGS.

Hearings shall not be open to the general public or press. Attendance shall be limited to persons determined by the Commission to have a direct connection with the appeal.

§ 22.607. APPEARANCE OF WITNESSES.

The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.

## APPENDIX B

U.S. CIVIL SERVICE COMMISSION,
*Washington 25, D.C., October 30, 1962.*

Hon. JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,
Civil Division,
Department of Justice,
Washington, D.C.

Attention David L. Rose, Esq.

Re: *Williams* v. *Zuckert,* et al., Supreme Court No. 133.

DEAR MR. GUILFOYLE: Mr. Rose of your office has requested that the Commission inform him of its administrative practice in reference to the right of an employee, in a veteran's preference appeal to the Commission of an adverse action, to have adverse witnesses produced by the agency for the purpose of cross-examination.

Section 14 of the Veterans Preference Act of 1944, as amended, 5 U.S.C. § 863, provides that the veteran has a right to appeal to the Civil Service Commission, and "shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission. * * *"

On November 7, 1944 the Commission issued Part 22 of its regulations to govern appeals under the Veterans Preference Act. 9 F.R. 13189. These regulations provided as follows:

> § 22.9 HEARINGS—(a) Right to appear personally or by representative. The appellant shall have the right to appear personally or

through or accompanied by a designated representative in connection with his appeal and if an appellant has expressed the desire for such a personal appearance arrangements will be made for a hearing following the investigation.

(b) Notice of hearings and where scheduled. (1) * * * (the Commission's notice shall inform) both parties of a right to produce evidence and witnesses. * * *

(c) How conducted. * * * an opportunity (will be) afforded for the introduction of evidence, including testimony and statements by the appellant and his designated representative and witnesses and representatives of the employing agency and witnesses, and for the cross-examination of witnesses.

* * * * *

(f) Appearance of witnesses. The Commission does not have the power of subpoena and appellants and their designated representatives, and employing agencies, will be required to make their own arrangements for the appearance of witnesses.

We are unaware of any right on the part of anyone to a "hearing" on appeal to the Commission prior to the issuance of these regulations. Neither the Lloyd-La Follette Act, 5 U.S.C. 652, nor the Commission's regulations issued thereunder, Part 9 of Title 5, CFR, provides for such a hearing.

It has been the consistent interpretation of the Civil Service Commission since enactment of the Veterans Preference Act of 1944 that the statute and regulations do not require the agency to produce witnesses whose presence is desired by the employee for the purpose of confrontation and cross-examination.

Sincerely yours,

/s/ Philip J. La Macchia,

PHILIP J. LA MACCHIA,

Chief, Hatch Act and Litigation Section,

Office of the General Counsel.

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